

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AGENOR V. MONDESIR	:	CIVIL ACTION
	:	
v.	:	
	:	
TRANS UNION	:	NO. 98-5989

MEMORANDUM ORDER

Plaintiff commenced this action in the Philadelphia Municipal Court on October 6, 1998, alleging that defendant issued a "bad credit report" which prevented him from obtaining a loan. Defendant removed the action to this court on the ground that plaintiff appeared to assert a claim under the federal Fair Credit Reporting Act. At various times, plaintiff proceeded pro se and with counsel. The court granted a defense motion to dismiss plaintiff's action on October 15, 1999. Presently before the court is plaintiff's motion to reopen the case. The motion was not served on the defendant.

While represented and while proceeding pro se, plaintiff flagrantly ignored his discovery obligations under the Federal Rules of Civil Procedure and two court orders. The court denied an initial defense motion to dismiss under Fed. R. Civ. P. 37(b)(2)(c) and 41(b), with a final warning to plaintiff. When plaintiff persisted in his failure to provide discovery, defendant again moved for dismissal. There was no response to that motion and, as noted, it was granted by memorandum order of October 15, 1999.

Plaintiff filed the instant motion more than thirteen months after his case was dismissed. Plaintiff states that the case should be reopened because his former lawyer rejected a settlement offer, presumably without plaintiff's approval although this is not altogether clear.

Plaintiff's motion to reopen is properly treated as a motion for relief from judgment pursuant to Fed. R. Civ.

P. 60(b). See Hayes v. United States Dep't of Transp., 162 F.R.D. 126, 128 (S.D. Ind. 1995). Applying the most liberal standard, the only conceivable bases for such a motion are those enumerated in Rule 60(b)(1) and (6).

Plaintiff does not claim his failure to comply with his discovery obligations and court orders was a result of excusable neglect, and indeed never offered a justification for his dereliction. It does not appear that his former lawyer acted mistakenly or inadvertently. In any event, a motion under Rule 60(b)(1) is untimely. The motion was not filed within a "reasonable time" after the basis for relief should have been known. See White v. American Airlines, Inc., 915 F.2d 1414, 1425 (10th Cir. 1990); Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 610 (7th Cir. 1986). Moreover, it was not filed within the strict one year deadline for Rule 60(b)(1) motions. See Ackermann v. United States, 340 U.S. 193, 197 (1950) (Rule 60(b)(1) motion "must, by the rule's terms, be made not more than

one year after the judgment was entered"); Gambocz v. Ellmyer, 438 F.2d 915, 917 (3d Cir. 1971) (Rule 60(b)(1) has strict one-year limitation period).

Rule 60(b)(6) operates as an equitable catchall provision and may only be used in "extraordinary circumstances." Ackerman, 340 U.S. at 202; Sawka v. Healtheast, Inc., 989 F.2d 138, 140 (3d Cir. 1993); Wilson v. Fenton, 684 F.2d 249, 251 (3d Cir. 1982). To demonstrate such circumstances, it must appear that "the movant is completely without fault for his or her predicament." 12 James Wm. Moore, Moore's Federal Practice, § 60.48[3][c] (3d ed. 1998). Plaintiff clearly is not without fault in the circumstances leading to the dismissal of this action.

Insofar as plaintiff is complaining about his former lawyer's earlier refusal of a settlement offer, that would not excuse plaintiff's recalcitrance in providing discovery. The appropriate remedy for attorney negligence or misconduct is a malpractice action and not the overturning of a judgment. See Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962); Pryor v. United States Postal Serv., 769 F.2d 281, 288-89 (5th Cir. 1985). If plaintiff's former attorney truly refused a settlement offer without authorization or against plaintiff's wishes, plaintiff's remedy is a malpractice claim for the amount the case could have been settled for.

ACCORDINGLY, this                    day of January, 2001, IT IS  
HEREBY ORDERED that plaintiff's motion to reopen (Doc. #16) is  
DENIED.

BY THE COURT:

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JAY C. WALDMAN, J.